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Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Application of Warehouse
Specialists, Inc., for After-the-Fact Permit Water
Quality Certification to Retain Fill Material
Discharged Into a Wooded Wetland, Winnebago
County, Wisconsin

Case No. 3-NE-97-056UF

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND WATER QUALITY CERTIFICATION**

Warehouse Specialists, Inc., P. O. Box 2397, Appleton, Wisconsin, 54913-2397, filed an after-the fact permit application with the Department of Natural Resources for water quality certification pursuant to sec. 401, Federal Clean Water Act, and Ch NR 103 and 299, Wis. Admin. Code. The proposed project is located at 655/675 Brighton Beach Road, Town of Menasha, Winnebago County, in Section 13, Township 20 North, Range 17 East and consists of expanding and extending a road through a wooded wetland. The proposed project would affect 0.6 acres of a T3k wetland.

On March 14, 1997, the Department of Natural Resources denied certification for the proposed project. The Department of Natural Resources received a petition for a contested case hearing dated April 14, 1997, from Attorney Dennis L. Fisher on behalf of Warehouse Specialists, Inc. On April 24, 1998, the Department forwarded the file to the Division of Hearings and Appeals for hearing.

Pursuant to due notice hearing was held on June 29-30, 1998 and July 1, 1998, at Appleton, Wisconsin, Jeffrey D. Boldt, administrative law judge (ALJ) presiding. The parties requested the opportunity to submit written briefs. The last brief was filed September 6, 1998.

In accordance with secs. 227.47 and 227.53(1)(c), Stats, the PARTIES to this proceeding are certified as follows:

Warehouse Specialists, Inc. (WSI), by

Dennis Fisher, Attorney
Meissner, Tierney, Fisher & Nichols, S.C.
111 East Kilbourn Avenue, 19th Floor
Milwaukee, WI 53202-6611

Wisconsin Department of Natural Resources (DNR), by

Edwina Kavanaugh, Attorney
P. O. Box 7921
Madison, WI 53707-7921

FINDINGS OF FACT

1. Warehouse Specialists, Inc. (WSI), P. O. Box 2397, Appleton, Wisconsin, 54913-2397, completed filing an application with the DNR for after-the-fact water quality certification pursuant to the Federal Clean Water Act, sec. 281.15, Stats. and sec. NR 103 and NR 299, Wis. Admin. Code.

2. The applicants own real property located at 655/675 Brighton Beach Road, Town of Menasha, in Section 13, Township 20 North, Range 17 East, Winnebago County. The above-described property includes numerous areas of wooded wetlands subject to the regulations described above.

3. The applicants filled approximately .6 acres of wooded wetlands in 1997 to construct an access road to its large warehousing packaging business in the Town of Menasha. Both parties agree that the project site included the filling of wetlands. WSI provides distribution and logistics services essentially involving the packaging and distribution of printed materials from bulk to a consumable size. (TR, p. 25) There are two large warehouse buildings at the project site. The wetland area that was filled is part of a larger complex of approximately 15 acres of wetlands at the project site.

4. The purpose of the fill was to provide an access road after a significant expansion of the warehouse facilities at the project site. The expansion was undertaken to accommodate the needs of WSI's largest client and single dominant tenant, the George Banta Company. Banta's business required expansion by WSI to accommodate a greater volume of work, and a hope to join the labor intensive handling operations under one roof. (TR, pp 60-62) Banta insisted that its operational efficiency, need for space and time-pressures required that the new building connect two existing buildings at the west end. (TR, pp 64-65) The physical layout of the two previously existing buildings was such that an old access road between the buildings would be eliminated by any connection of the two existing buildings. (See: Exs. 3-12) WSI connected the buildings and eliminated the existing access road, which had the effect of creating a fire safety hazard and of exacerbating existing traffic safety conflicts.

5. There are currently no practicable alternatives to the fill which will not adversely impact the functional values of wetlands at the project site. The expansion of the warehouse facilities was undertaken in a manner which eliminated an access lane to the two large storage facilities at the site. A clear preponderance of the evidence demonstrated that to restrict access to one point presented a significant fire safety hazard to the two buildings and WSI employees. Town of Menasha (the Town) Fire Chief Cox was persuasive that the two large buildings, one 750 feet long, and one 1675 feet long, were filled with combustible materials and were located in

a remote location. The WSI site was thus a "target hazard" for the Town, because of the safety risks posed and its remoteness from fire stations. A single access option is not practicable from the standpoint of fire safety because a fire-fighting vehicle may get in and be trapped by a collapsing building or fire wall. (TR, pp. 414-415) The National Fire Prevention Association (NFPA) model code, which has been adopted by the Town, strongly recommends two access points for firefighting under these circumstances. (TR, pp 332-333) Further, site logistics would make it difficult to get a sufficient supply of water to fight the fire if only the hydrants at Brighton Beach Road and the reservoir were available. (TR, p. 412) In connection with the facility expansion, a new hydrant was installed in an area of the wetland fill. (Ex. 49) The new hydrant provides significantly more capacity for firefighters in dealing with a potentially catastrophic fire. (Phillips, TR, p. 317)

6. WSI presented the expert testimony of Kenneth Voigt, a traffic safety engineer. Voigt presented essentially un rebutted expert testimony that the traffic pattern was a safety hazard without the access road in the area of the wetland fill. Brighton Beach Road is 22 feet wide, and heavily-used because of nearby public facilities, including a city beach and nature preserve, both on Lake Winnebago (TR, pp.228-230) The semi-tractor trailers servicing the WSI buildings are each 9 ½ feet wide. The biggest risk is thus posed when there are two such trucks heading in opposite directions on Brighton Beach Road. Voigt opined that elimination of the new, eastern access road in the area of the proposed fill would not be practicable given traffic safety concerns if all truck traffic were routed along Brighton Beach Road.

A clear preponderance of the credible evidence supports a finding that there are serious traffic safety concerns posed by eliminating the eastern access road and routing all traffic on Brighton Beach Road. A condition reducing the filled area to a one-way roadway 20 feet wide will reduce traffic safety conflicts along Brighton Beach Road and will eliminate the particular concerns related to two semis meeting on the road

7. This is an after-the-fact permit application. The Department and the applicant agree that the after-the-fact application should be treated the same as a timely water quality certification request. Yet the record remains speculative as to whether there were practicable alternatives to the fill available to the applicant in 1997. The overall project purpose was to expand the existing warehousing facility. Any practical alternative thus had to maintain two fire-safety access points to the expanded facility. WSI undertook the fill project without a permit, knowing that there was a strong possibility that a permit was required. (TR, pp.172-174) Duane Fox was the engineer in charge of the facility expansion and related fill and creation of the eastern access road. Fox testified that WSI made a business judgment to proceed with the fill without obtaining a wetland fill permit from the USA COE and water quality certification from the DNR. (TR, p.169) Fox testified that the WSI decision-makers were very conscious of the possibility that a fill permit would be needed in connection with the creation of the eastern access road in the wetland area. Fox concluded that he thought WSI should have applied for a fill permit prior to undertaking the fill and that his professional judgment was that a permit would have been granted. (TR, p. 86)

8. The testimony of Mr. Fox provided insight into a decision-making process that was more personality-driven than rational. (TR, p 127) It was particularly disturbing to hear of

an engineer unwilling to give sound professional advice because, as Mr. Fox put it, "I generally don't argue with Mr. Schroeder." (TR, p. 188) WSI's own expert testified that the building expansion was a poor design for fire safety. (TR, pp 345-346) But the building expansion was already well underway when the DNR learned of the proposed fill (TR, p. 663) The Department did not consider placing the building elsewhere as a part of the practicable alternatives analysis. (Id.) Accordingly, for purposes of this decision, it has been assumed that the placement of the building was an established fact

The fire safety concerns are very significant and expose literally hundreds of people to danger. The DNR took the position that it would consider fire safety as a part of practicable alternatives "logistics" only if "some type of rule on code were broken." (TR, p. 645) This position is too narrow under all of the circumstances in this case. Both fire safety experts presented by WSI were emphatic that both the NFPA code, adopted by the town, and good professional practice required two access points. (TR, p. 333) The record therefore supports a finding that there were no practicable alternatives to some filling of wetlands to accomplish this purpose.

9. Wetlands are recognized by law and science as a natural resource which provide significant public benefits. See: 33 CFR s.320.4(b)(1) and (2)(viii) The wetlands at the project site provide significant value in terms of the functions of wetlands in protecting water quality, attenuating flood and stormwater runoff, maintaining floral and vegetative diversity and providing aesthetic and recreational opportunities. (Ex. 57) The wetlands do not involve a surface water shoreline, fisheries habitat and its involvement in groundwater protection and recharge is minor or insignificant. (Id.)

10. Department Wetlands Ecologist Patricia Trochlell inspected the roadway fill area on June 26, 1998, and prepared a report which concluded that the fill area had had a significant detrimental impact upon the above wetland functional values (Ex. 59) Trochlell's report concluded as follows:

The direct impact of the road fill is the loss of 0.5 acres of forested wetland. The Wetland loss eliminates the species which could not move, such as the vegetation and invertebrates and it displaces other species, such as the amphibians and mammals. The loss of wetland eliminates 3% of the flood storage capacity function of the wetland. Some plant and animal species may not tolerate the disturbance to their habitat, if species are edge-sensitive, such as species of plants which need canopy cover or species of birds whose nests are often parasitized by cowbirds along disturbed forest edges. . . .

As a result of the road fill, many non-native invasive species have colonized the road fill. Reed canary grass (*Phalaris arundinacea*), thistle (*Carduus sp.*), dandelion (*Taraxacum officinale*), Japanese smartweed (*Polygonum cuspidatum*), burdock (*Arctium minus*) and purple loosestrife (*Lythrum salicaria*) are a few of the many noxious weedy species colonizing the road banks and ditches. Over time, these species may

be expected to spread into other lesser impacted areas of the wetland. Additional truck traffic and building activity may also be expected to cause additional disruption to wetland species. (Id.)

Accordingly, permit conditions have been added to destroy invasive species and to maintain the integrity of the native plants along the roadway. Further, a condition has been added to develop a plan to protect the natural diversity of plants in the southeastern corner of the property.

11. Trochlell testified that the lowland hardwood forest wetland at the fill site were "extremely significant" habitat for reptiles and amphibians. (TR, p. 716) Further, some ten species of herptiles would be expected to be found in the area, including the threatened Blandings turtles, which are known to nest nearby (TR, pp. 716-717) Russo opined that the fill has had a detrimental impact upon reptiles and amphibians attempting to cross the roadway to access water resources. (TR, p. 670) Accordingly, a condition has been included to require installation of one or more culverts, presumably box culverts, which said species can use for this purpose. Restoration of the area and a reduction in the size of the fill area should further reduce detrimental impacts to herptiles and other wildlife

12. The DNR has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

13. All of the conditions set forth below are necessary to mitigate the detrimental impacts to wetlands that have already occurred and are likely to occur as a result of the fill.

DISCUSSION

This is a very difficult case. WSI displayed a disturbing willingness to fill wetlands without first obtaining a permit. Assuming placement of the buildings in their current configuration, the eastern access roadway was necessary. However, the existing fill, undertaken with a brazen disregard for state and federal law, is far more than was necessary to accomplish the "overall project purpose" of building expansion and maintenance of good access for fire safety. Accordingly, the existing roadway must be reduced and must be made in a way that reduces the obvious detrimental impacts that have already occurred as a result of WSI's undertaking the project without consultation with the DNR.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to water quality certification cases pursuant to sec. 227.43(1)(b), Stats., and sec. NR 299.05(b), Wis. Admin. Code.

2. The proposed fill to create an access road is not a wetland dependent activity within the meaning of sec. NR 103.07(2) and NR 103.08(4)(a)(1), Wis. Admin. Code., because

construction of the access road is not of a nature that requires location in or adjacent to surface waters or wetlands to fulfill its basic purpose.

3. There are currently no "practicable alternatives" "available and capable of being implemented" to the reduced fill area and access road, "after taking into consideration cost, available technology and logistics in light of overall project purposes" within the meaning of sec. NR 103.07(2), Wis. Admin. Code. Fire and traffic safety concerns are properly considered as part of the "logistics" relating to the project.

4. The proposed project will not result in violation of the standards contained in sec. NR 103.08(3), Wis. Admin. Code in that no practicable alternatives to the proposed project which will not adversely affect wetlands exist nor will the proposed project result in significant adverse impact to the functional values of the affected wetlands, significant adverse impacts to water quality or other significant adverse environmental consequences.

5. The subject property is located within an "area of special natural resource interest" within the meaning of sec. NR 103.04, Wis. Admin. Code

6. The Department has the authority pursuant to sec. NR 299.05, Wis. Admin. Code, to approve water quality certification if it determines that there is reasonable assurance that the project will comply with the standards enumerated in sec. NR 299.04, Wis. Admin. Code.

ORDER

WHEREFORE IT IS HEREBY ORDERED, in accordance with the foregoing Findings of Fact, Conclusions of Law, that water quality certification be granted subject to the following conditions:

1. The applicant voluntarily submits to the jurisdiction of the State of Wisconsin to enforce the terms and conditions of the certification in circuit court;

2. The eastern access roadway shall be reduced in width to 20 feet; to the extent possible, the other portions of the road shall be restored to its condition prior to the fill;

3. The roadway shall accommodate only incoming traffic, except under emergency circumstances;

4. The applicant shall undertake a complete delineation of wetlands located on the property with participation by WSI, the Corps, the DNR, and the County, or some representatives selected by them;

5. The applicant shall provide plans and specifications acceptable to the DNR to place at least one additional culvert of a size and at a location acceptable to the DNR; said culvert shall be designed to accommodate and encourage movement across historic pathways of turtles and other amphibians.

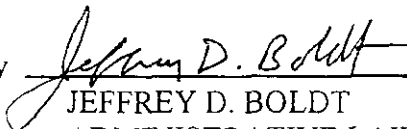
6. The roadway borders shall be cleared of non-native, invasive species and be replaced by native grasses or shrubs as agreed upon in a plan approved by the DNR; the certification holder shall provide a maintenance plan to keep the area clear of invasive exotic species, including, but not limited to, those identified in Finding #10 above;

7. The applicant shall not cut trees in the areas identified as wetlands except where maintenance of utility lines, roadway safety, removal of diseased trees or other emergency situation arises;

8. WSI shall provide a plan acceptable to the DNR to protect the floristic diversity in the southeastern corner of the property

Dated at Madison, Wisconsin on October 27, 1998

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By 
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs 227.52 and 227.53, Stats, to insure strict compliance with all its requirements.